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No. 129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

ALL AMERICAN AIRWAYS, INC., et al.,
Petitioners,

v.

UNITED AIR LINES, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI AND TO MOTION TO DEFER CONSIDERATION THEREOF

ROBERT L. STERN
WILLIAM M. DICKSON
MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois

HOWARD C. WESTWOOD
WILLIAM H. ALLEN
COVINGTON & BURLING
701 Union Trust Building
Washington, D.C.

JAMES K. CRIMMINS
EDMUND E. HARVEY
CHADBOURNE, PARKE, WHITESIDE & WOLFF
25 Broadway
New York, New York
Counsel for Respondents.

McCORMICK & HENDERSON INC., CHICAGO, ILL.

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 278 F. 2d 446.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Section 401 of the Federal Aviation Act provides in part:

> (e) "Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered * * * ".

The question is whether this allows the Civil Aeronautics Board to issue certificates authorizing carriers to operate between any two points in the United States, without specification.

2. Section 401(e) also provides that

> "No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules * * * ."

The question is whether a term in the certificate prohibiting more than ten scheduled flights per month between any two points is a restriction upon the right of a carrier to add to or change its schedules, in violation of this provision.

3. Section 401(d)(1) provides that

> "The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly. * * * ."

The Board granted uniform authority to all the supplemental carriers to engage in all types of supplemental service throughout the nation, even though various of them had engaged in only small or specialized operations in the past and had not shown ability to undertake the extensive operations authorized. The question is whether the finding of fitness of each carrier must reasonably relate to all of the transportation which the Board is authorizing it to perform.

STATUTES INVOLVED

The pertinent provisions of the Federal Aviation Act of 1958 are set forth in the appendix to the petition, pages 1a-4a. The provisions principally involved have been set out in the Questions Presented immediately above. The Act of July 14, 1960, empowering the Board to validate the certificates here in issue for twenty months, is printed in the appendices to the Petitioners' Motion to Defer Consideration and the Board's Memorandum.

STATEMENT

This has been a long and involved proceeding, which shall be summarized here only to the extent necessary for present purposes.

In 1951, the Civil Aeronautics Board undertook to investigate the status of and the need for the services of the irregular air carriers. These carriers had been operating without certificates of convenience and necessity, under a blanket exemption from the certificate requirements of the Act which allowed them to engage in air transportation only on an infrequent and irregular (*i.e.*, nonscheduled) basis. This blanket exemption did not distinguish between charter flights (in which the entire capacity of an aircraft was engaged) and flights for the carriage of individually-ticketed passengers or individually-waybilled cargo shipments, both types of service being counted in determining compliance with the authorized scope of operations.

Many carriers submitted applications for certificates or exemption authority for irregular or "supplemental" transportation.[1] After hearing evidence as to some of the individual applicants, the Board limited the proceeding to the general questions as to the need for a class of supplemental carriers. The Board found that there was need for such a class and that each carrier in the class should be authorized to undertake unlimited numbers of charter flights, and up to 10 *scheduled* flights per month, carrying individually-ticketed passengers or individually-waybilled

[1] The Board formerly described these carriers as "irregular;" it now calls them "supplemental."

cargo ("individual sales" flights) between any two points in the United States. The Board reserved final decision until the completion of the record as to whether this authority should be granted by certificate or exemption. It granted an interim exemption to all of the applicants then holding valid authority as irregular air carriers, without regard to their qualifications, to permit them to engage immediately in the operations which the Board said it would grant on final decision. This exemption was set aside by the Court of Appeals in 1956 in *American Airlines* v. *Civil Aeronautics Board*, 235 F. 2d 845 (C.A.D.C.), certiorari denied, 353 U.S. 905. The mandate of the court was stayed pending the conclusion of the administrative proceeding, however, by consent of the parties, so the applicants have continued to operate under the exemption order up to now.

The testimony as to individual applicants was then completed. In 1959 the Board, by a three to two vote, decided to issue certificates of public convenience and necessity to all of the carriers it found qualified. It accordingly granted the approved carriers unlimited charter authority, and permission to operate ten scheduled individual sales flights per month between any two points in the United States. The validity of the individual sales part of the grant of authority has been the principal issue in this litigation. The two dissenters (R. 1258A-1260A) and also the two trial examiners (R. 123A-127A) were of the opinion that the Board lacked legal authority to issue such certificates, for the reasons stated by the court below and summarized in this brief at pages 10-17, *infra*.

Twenty-five of the 54 applicants were found "fit, willing and able," and accordingly granted certificates. Each successful applicant was granted identical operating au-

thority to engage in all of the transportation authorized, despite the fact that many of them could demonstrate only limited experience and qualifications not extending to the whole scope of authority granted. Thus, some of these carriers had previously carried only cargo; some had only operated charter flights; some had only operated in special areas, such as in or near Alaska. A number had very slight resources, or none at all, and had not been operating for some years prior to the Board's decision in 1959. *E.g.*, R. 924A-927A, 1036A-1040A, 1171A-1172A, 960A-961A, 413A-414A, 1163A, 486A-487A, 1168A.

The respondents here filed petitions for review in the Court of Appeals for the District of Columbia. On April 7, 1960, that court set aside the Board's order on the ground that it violated the statute in relation to the three points stated in the Questions Presented (Petition App., pp. 11a-15a).

The Civil Aeronautics Board then made a request for legislative relief from the Congress. On July 14, 1960, Public Law 86-661, 74 Stat. 527, was approved, empowering the Board to validate for twenty months the certificates issued in this proceeding and to grant interim operating authority of the same scope to certain other carriers for the same period.

The petition for certiorari was filed on June 6, 1960. On June 17, 1960, the Chief Justice granted a motion to extend the Civil Aeronautics Board's time to petition until September 3, 1960, and on June 28, 1960, extended the respondents' time to file their brief in opposition to October 3, 1960. The Civil Aeronautics Board has filed no petition for certiorari.

REASONS FOR NOT GRANTING THE WRIT OR DEFERRING CONSIDERATION OF THE PETITION

This is not a case for certiorari, both because Congress has taken the matter in hand and because the issues were decided by the Court of Appeals in the only way the statute permits.

I.

After the decision below, the Civil Aeronautics Board sought to have Congress amend the statute so as to authorize it to issue the type of certificate which it had granted in this case.[2] The legislative history shows that the question was deemed too difficult to be disposed of within a few weeks without full consideration by the Congress of all phases of the problem. Accordingly, Congress in substance authorized the maintenance of the status quo for twenty months to give it ample time to consider the matter carefully.

Both petitioners and the Civil Aeronautics Board recognize that the action of Congress renders the granting of certiorari inappropriate at the present time. They suggest, however, that this Court retain the case on its docket for the twenty-month duration of the recent statute, or vacate the judgment below and order the Court of Appeals to do so. Respondents submit, on the contrary, that the Congressional intervention furnishes an additional ground

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[2] The bill proposed by the Board is set forth in the proceedings before the Senate Committee. Hearings Before the Aviation Subcommittee of the Committee on Interstate and Foreign Commerce on S. 1543, 86th Cong. 2d Sess. 11-13 (1960).

for denying the petition, not for postponing consideration of it.

Respondents agree that the temporary statute does not render the case moot. *Flemming* v. *Florida Citrus Exchange*, 358 U.S. 153, 168 (1958). But the Board's resort to Congress and the enactment of the statute does deprive the case of importance. The practical commitment of Congress to explore the problem and decide what should be done about it within the twenty-month period makes resolution of the legal question by the court as unnecessary then as it is now.

In recommending a twelve-month grant of temporary authority, the House Committee declared (H. Rep. No. 1877, 86th Cong., 2d Sess. 2):

> "This stopgap legislation will give the Congress an opportunity to explore in more detail important problems of policy raised by the decision."

The Conference Committee extended this period from twelve to twenty months (H. Rep. No. 2072, 86th Cong. 2d Sess.). This action was explained by Representative Williams, Chairman of the House Subcommittee and a manager on the part of the House, as follows [106 Cong. Rec. 14693 (daily ed., July 2, 1960)]:

> "The conference agreement is for 20 months. It was agreed that every effort would be made on both sides to expedite consideration of the Board's request for permanent legislation. A number of important policy questions are involved but it is hoped that the Board's proposal can be considered and decided early in the next session. However, if some unexpected delay should be encountered, the amendment agreed to in conference will give us an opportunity to reach an agreement early in the 2d session of the next Congress."

Whether Congress changes the law so as to permit supplemental carriers to operate on regular schedule or refuses to do so, its action or inaction will manifest its intention for the future. If the law is changed, the new provisions will, of course, be controlling. If Congress deliberately decides not to grant the Board the new authority requested, that will also be decisive for the future. There is no reason to believe that Congress will let the matter go by default.

The requests for deferred consideration might have more force if the case were one in which certiorari should be granted, apart from the temporary statute. But the decision below is so clearly required by the language of the Civil Aeronautics Act, on each of the three grounds relied upon by the court below—any one of which would be sufficient for affirmance—that review by this Court is not warranted either now or in the future.[3]

There is no good reason to defer consideration of a non "certworthy"[4] petition in order to await subsequent action by Congress which will make review by this Court even less important and necessary. The Board's sugges-

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[3] Mr. Clayton Burwell, President of the Independent Airlines Association, one of the two associations representing the supplemental air carriers, in asking for Congressional relief from the decision below, stated to the House Committee: "What will probably happen, without boring you with the minute details, I think most lawyers in here have decided, at least I have, there is not one chance in a hundred that the Supreme Court would accept certiorari and overrule the circuit court. In all candor, I just do not think there is a chance. As a lawyer, Mr. Chairman, you know many are called but few are chosen." Hearings Before Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 7593, 86th Cong. 2d Sess. 61-62 (1960).

[4] For this useful word, we are indebted to Mr. Justice Harlan.

tion that the judgment below should be vacated and the case remanded to the Court of Appeals to hold until it sees what Congress does has even less to commend it. A proper and correct judgment in a case, which concededly is not moot, should not be set aside; respondents are entitled to the benefit of that judgment, except as Congress provides otherwise, unless it is reversed by this Court as erroneous. If new legislation enlarging the Board's authority is enacted, that will control whether or not the case is retained below. Although action by the Board might be called for, there is no reason to believe that anything would have to be done in the court below to make any new legislation effective. If that should be necessary, appropriate steps can be taken in the court at that time, without vacating its judgment now. If Congress does not change the law, the Court of Appeals should not have to "reconsider its decision and enter a new judgment" as the Government's Memorandum suggests.

II.

The decision below was clearly required by the provisions of the Federal Aviation Act.

A. The first sentence of Section 401(e) reads:

> "Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered * * * ."

Here the Board has authorized the irregular carriers, now called the supplemental carriers, to operate "between any point" in the United States and "any other point" in the United States. R. 1280-A. On its face, this is not a specification of terminal or intermediate points as required by the statutory provision.

The word "specify," according to the authority cited by the Board in its brief below, is defined as

> "To mention specifically, to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize, or to distinguish by words one thing from another."[5]

All of the definitions agree that the essence of "specify" is to mention in a precise and detailed manner. This might not require use of a geographical name if a point were otherwise described, as by latitude and longitude for example. But some kind of specification is essential, and the Board's bare reference to transportation between any points in the United States contains no specification at all.

If there should be any doubt as to what the first sentence of Section 401(e) means, it would be removed by reference to the following sentences in the same paragraph. The next sentence provides:

> "A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place *without* the United States, *designate the terminal and intermediate points only insofar as the Board shall deem practicable*, and otherwise shall designate only the general route or routes to be followed." (Emphasis supplied.)

In short, outside the United States it is permissible to designate routes instead of points when it is not practicable to name points. Read together with the first sentence, this clearly means that for transportation *within* the United States specific points were to be designated in all instances, with no exception for cases where the Board does not deem this practicable. In the present case, the Board

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[5] Black's Law Dictionary (1951). See to the same effect Webster's New International Dictionary (1957); 39A Words & Phrases (Perm. Ed.) 469 *et. seq.*

thought it impracticable and undesirable to name points or even routes for transportation within the United States, and accordingly did not do so. The Act gives it no such power.

The last two sentences of Section 401(e) contain other exceptions from the requirement that certificated carriers operate only between points named in the certificate. They provide:

> "No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off *during an emergency at a point not NAMED in its certificate* or by *operating in an emergency* under regulations which may be prescribed by the Board, *between terminal and intermediate points other than those SPECIFIED in its certificate.* Any air carrier may make charter trips or perform any other special service, without regard to the *points NAMED in its certificate,* under regulations prescribed by the Board." (Emphasis supplied.)

The clearly expressed understanding is that, except for emergencies or charter trips, a carrier must stop only at "points named in its certificate."

These passages and others, such as § 405(b), prove that Congress understood that outside of the excepted situations, certificated air carriers were to be authorized to operate only between specified, designated, or named points.

That Congress intended the words of the Act to mean exactly what they say is also shown by the legislative history. The Civil Aeronautics Act was in many respects modeled on the Motor Carrier Act enacted three years before.[8] That Act (49 Stat. 552, 49 U.S.C. § 308(a))

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[8] *Acquisition of Marquette by TWA*, 2 C.A.B. 409, 412 (1940); *American President Lines*, 7 C.A.B. 799, 804 (1947); Hearings on S.2 and S.1760 before a Subcommittee of the Senate Committee on Interstate Commerce, 75th Cong., 1st Sess. 86, 70, 333 (1937).

authorized area as well as route certificates, and so did some early Civil Aeronautics bills (S. 3027, § 407(a), S. 3420, § 405(e), 74th Cong., 1st Sess.). The area provision was soon deleted from these bills, leaving a requirement that *routes* be specified. (S. 2, 75th Cong., 1st Sess. § 305(e).) The reference to terminal and intermediate points was finally substituted for routes, since Congress was not concerned with the precise course of flight in the air between the termini.[7] Thus Congress deliberately chose not to follow the Motor Carrier scheme permitting designation of areas of operation as distinct from designation of routes or terminal points. The Board's decision in this case not only requires that the Act be construed to allow reference to general areas instead of points but that the whole United States be treated as one area.

In 1943 and 1944 and again in 1954, Senator McCarran and Representative Lea, the chairmen of the committees which had sponsored the 1938 Act, proposed amendments to permit the specification of areas of operation where it was impracticable to specify the points.[8] Rep. Lea referred to the naming of points as an "absolute requirement."[9] These amendments were not adopted by Congress. But even they would not have gone so far as completely to eliminate any specification by allowing the "anywhere to anywhere" flights here authorized by the Board.

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[7] Hearings on S. 2 and S. 1760 before a Subcommittee of Senate Committee on Interstate Commerce, 75th Cong., 1st Sess. 432 (1937); H.R. 9738, 75th Cong., 3rd Sess.

[8] S. 1790, 78th Cong., 2d Sess. § 301(f) (1944); H.R. 3420, 78th Cong., 1st Sess. § 6(d) (1943); H. Rep. No. 784, 78th Cong., 1st Sess. 24 (1943); S. 2647, 83rd Cong., 2d Sess. (1954); Hearings on S. 2647 before the Senate Committee on Interstate and Foreign Commerce, 83rd Cong., 2d Sess. 122 (1954).

[9] H. Rep. No. 784, 78th Cong., 1st Sess. 24 (1943).

As recently as last term, in *T. I. M. E., Inc.* v. *United States*, 359 U.S. 464 (1959), this Court dealt with a similar situation. Just as the Civil Aeronautics Act departed from the Motor Carrier Act in the provision here in question, so had the Motor Carrier Act departed from Part I of the Interstate Commerce Act. Proposals to add the omitted reparation provision to the Motor Carrier Act were made and supported by the Commission, but not adopted by Congress. The Court held that this history prevented it from reading the omitted provision into the statute. This decision is equally applicable here.

Petitioners purport to find support for their position that it was intended that the irregulars receive certificates in a single phrase at the end of a paragraph explaining to the House Committee the need for *exemption* authority.[10] But this general statement is nowhere explained, and its meaning in relation to the present problem is certainly not apparent. Neither the speaker nor Congress were focusing upon the problem raised by the requirement that a certificate specify the terminal and intermediate points. To treat this vague expression as sufficient to overcome the specific words of the statute and the history already referred to would, indeed, be far-fetched.[11]

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[10] The representative of the Department of Commerce on the Interdepartmental Committee which drafted the bill which became the Civil Aeronautics Act of 1938, Mr. Fagg, in referring to the exemption provision, said:

> "Therefore, this provision has been put in to exempt from any requirement of a certificate of convenience of that type of carrier until it is found to be in the public interest." (Hearings before the House Interstate and Foreign Commerce Committee on H.R. 9738, 75th Cong., 3d. Sess., 420-421 (1938).

[11] Petitioners, relying on two or three cases involving Alaska and Samoa in which the Board authorized service between all points in certain areas in or near the territory, assert that "the court below

B. The fourth sentence of Section 401(e) provides that "no term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules * * *." No one has denied that the certificate here limiting the applicants to 10 flights per month between any two points does restrict the right to add to schedules.

But it is argued that the first sentence of Section 401(e) says that every certificate shall specify (in addition to the points) "the service to be rendered," and that so long as the prohibition against restricting the right to add schedules can be characterized as a part of the definition of the service, it is lawful. Any such reading would completely emasculate the prohibition in the fourth sentence, since the provisions of a certificate limiting schedules could always be described as a specification of the service to be rendered.

Obviously Section 401(e) has to be read as a whole. The first sentence, saying what a certificate *shall* contain, refers generally to the service to be rendered. The fourth sentence lists a few specific things which a certificate *shall not* contain. As experience has demonstrated, this leaves ample play for the issuance of lawful certificates. The only sensible reading of these sentences together is that certificates may describe services in any way except those prohibited by the fourth sentence.

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overturned a long-established administrative policy." The rulings as to such territories as Alaska and Samoa do not conceivably support the certificates for "anywhere to anywhere" flights in the United States granted by the Board here. Furthermore, so far as appears, no one raised the present problem in those cases. It was not mentioned in the Board's opinions and no one objected to the Board's decision. In other cases, the Board had repeatedly stated that it was "necessary to designate points." *Pan American Airways*, 1 C.A.A. 118, 129 (1939); *American Airlines, New York Operations*, 1 C.A.A. 480, 487 (1939); *Panagra Terminal Investigation*, 4 C.A.B. 670, 674 (1944).

Furthermore, the legislative history shows that the fourth sentence in Section 401(e) was added to the statute in 1938 precisely for the purpose of making clear that the broad words "service" in the first sentence should not be construed to allow the Board to control "the number of schedules to be flown."[12]

Subsequently, in 1949 and 1954, two Board members and the Board's general counsel told Congressional committees that the Act prohibited the Board from limiting the number of schedules which a carrier may operate.[13] The Board's general counsel in 1954, when testifying as to the possibility of certificating the irregular carriers, said:

> "Of course, even if you succeed in defining the class of service you cannot limit the number of schedules provided in that class of service nor could the Board disregard the other limitations that are specifically prohibited in Section 401(f) [now Section 401(e)]."[14]

These statements were made with particular reference to the irregular carrier problem with which this case is concerned. The Board was seeking authority to grant the kind of certificate it purported to grant in 1959 without benefit of the amendatory legislation it requested, and which Congress did not enact.

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[12] Hearings on S. 2 and S. 1760 before a Subcommittee of the Senate Committee on Interstate Commerce, 75th Cong., 1st Sess. 338, 341-342, 346, 518 (1937).

[13] Hearings pursuant to S. Res. 50 before the Senate Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess. 49 (1949); Hearings on S. 2647 before the Senate Committee on Interstate and Foreign Commerce, 83d Cong., 2d Sess. 1236, 1233-1234, 692 (1954).

[14] *Id.* at 1236.

Petitioners claim that the decision below conflicts with *Crescent Express Lines* v. *United States*, 320 U.S. 401 (1943). In that case the Court held that the provision of the Motor Carrier Act prohibiting the ICC from restricting the right of a carrier "to add to its equipment" did not prevent the Commission from limiting the applicant to vehicles carrying no more than 6 passengers—*i.e.*, to limousines but not buses. The Court stated (320 U.S. at 408-9):

> "We agree with the Commission that the proviso is a prohibition against a limitation on the addition of *more vehicles* of the authorized type, not a prohibition of the *specification of the type*." (Emphasis supplied)

Since this case is concerned with a certificate restricting the addition of *more* schedules, the Court's holding that the ICC is barred from such a quantitative provision shows that *Crescent* supports the position of respondents, rather than petitioners.[15]

C. Section 401(d) provides:

> "The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly * * *."

The Board here granted all the approved supplemental carriers the same authority to carry passengers and cargo by charter or by individually ticketed or waybilled flights anywhere in the United States, subject to the ten flight limitation for the non-charter operations. As the court below said, (Petition, App. 13a):

> "In many instances the prior operations of individual applicants had been small or specialized, and in

[15] *Los Angeles Airways Renewal Case*, Order E-12832, July 28, 1958, also relied on by petitioners, is distinguishable for the same reason.

many instances the financial resources, adequate for the types of operations theretofore conducted by the carriers, were obviously inadequate for operations of the scope authorized by the certificates."

For example, Sourdough Air Transport (R. 1036A-1040A, 1075A, 1171A-1172A) operated in Alaska between 1947 and 1949, and 1952 and 1953, but not since, at a small profit. Its present net worth of $19,000 was predicated upon the repair of a wrecked DC-3 which it had bought for $75. The Board found that while repairs would cost $50,000, the value of the repaired aircraft could easily exceed that: Sourdough's future plans were limited to operation of two DC-3s between Seattle and Alaska. Another approved carrier, Arctic Pacific (R. 924A-927A, 1070A, 1073A), had carried only cargo in Alaska up to 1952, had not operated as an irregular carrier since then, and planned only to transport cargo in the future. It lost $7,000 in small plane operations in 1956, and its net worth at the last time of record was $10,000.[16]

Nevertheless, these applicants were authorized to engage in cargo and passenger operations, both charter and individual sales, anywhere in the United States. Their resources and indeed their operating plans and organization are obviously not sufficient for any such wide-spread operation. There is no relationship between the fitness and ability—and even the willingness of these applicants—and the scope of the authority granted.

What the Board has done is to find that each of various applicants has resources and experience to perform a part of the service authorized, and then has authorized each to do anything which any member of the group was qualified to do. This cannot be reconciled with the statutory

[16] All of these facts are taken from the Board's findings.

requirement that each applicant must be fit and able to perform the service authorized—which obviously means all of it.

Section 401(d) says that the Board shall issue a certificate authorizing transportation, if it finds that the applicant is "fit, willing and able to perform *such* transportation." (Emphasis supplied.) The fitness and ability must be for "the transportation authorized by the certificate," as the Court below held (Petition, App. 13a). This would be obvious as a matter of sense even if the statute were not perfectly clear. These applicants are plainly not fit, willing and able to perform the transportation authorized by the Board.

This is not a technical objection. Financial resources proportional to the service authorized are essential to the protection of the public. Experience with other irregular carriers had proved what happened when carriers were inadequately financed. Passengers whom an airline was unable to carry for one reason or another did not obtain refunds or had difficulty in doing so. Passengers stranded by bad weather were not taken care of by the airline. These facts are set out in greater detail in the findings (R. 735A-736A, 195A-196A, 271A-272A).

The Court below was unquestionably correct in setting aside the Board's order. The language and history of the Act are so clear-cut in relation to the issues discussed that there would be no point to further review by this Court. The fact that Congress has, in effect, stayed the decision below, so that it can consider the problem itself and determine whether the law should be changed, does not make the case more suitable for certiorari, but the contrary.

CONCLUSION

For the above reasons, the motion to defer consideration and the petition for certiorari should both be denied.

Respectfully submitted,

ROBERT L. STERN
WILLIAM M. DICKSON
Attorneys for
United Air Lines, Inc.

MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois

HOWARD C. WESTWOOD
WILLIAM H. ALLEN
Attorneys for
American Airlines, Inc.

COVINGTON & BURLING
701 Union Trust Building
Washington 5, D.C.

JAMES K. CRIMMINS
EDMUND E. HARVEY
Attorneys for
Trans World Airlines, Inc.

CHADBOURNE, PARK,
WHITESIDE & WOLFF
25 Broadway
New York 4, New York

E. SMYTHE GAMBRELL
CHARLES A. MOYE, JR.
THEODORE M. FORBES, JR.
Attorneys for
Eastern Air Lines, Inc.

GAMBRELL, HARLAN,
RUSSELL, MOYE &
RICHARDSON
825 Citizens & Southern
Bank Building
Atlanta 3, Georgia

CLEARY, GOTTLIEB, STEEN
& BALL
Southern Building
Washington 5, D.C.

ROBERT C. BARNARD
Southern Building
Washington 5, D.C.

JOHN C. PIRIE
ELIHU SCHOTT
135 East 42nd Street
New York 17, New York
Attorneys for
Pan American World Airways, Inc.

R. S. MAURER
Atlanta Municipal Airport
Atlanta, Georgia
Attorney for
Delta Air Lines, Inc.

C. EDWARD LEASURE
Attorney for
Northwest Airlines, Inc.

RICHARD A. FITZGERALD
729—15th St. N.W.
Washington 5, D.C.
Attorney for
National Airlines, Inc.

JOSEPH S. HAYS
AMOS M. MATTHEWS
J. D. FEENEY, JR.
280 Union Station Building
Chicago 6, Illinois
Attorneys for
Atchison, Topeka and
Santa Fe Ry. Co., et al.